LIBRARY
SUPREME COURT, U. S.

FILED
AUG 5 1968
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

PETITION NOT PRINTED

No. 201

JOHN DALMER BENTON,

Petitioner,

—v.—

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF FOR THE PETITIONER

M. MICHAEL CRAMER
H. THOMAS SISK
LAURENCE LEVITAN
PAUL H. WEINSTEIN
Counsel for Petitioner
1225 Connecticut Avenue N.W.
Washington, D. C. 20036

INDEX

SUBJECT INDEX

BRIEF FOR PETITIONER

	Page
Opinion Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Questions Presented	3
Statement:	
The First Trial	3
The Second Trial	5
Argument:	
I. The Fifth Amendment's Prohibition Against Prosecution of a Defendant Twice for the Same Offense Should Apply, Through the Fourteenth Amendment, to State Prosecutions	6
II. The Petitioner Was "Twice Put in Jeopardy" and His Conviction at the Second Trial Was Void Under the Fifth Amendment Standards	13
III. The Petitioner Was Prejudiced by Standing Trial Wrongfully on the Larceny Charge Together With the Valid Charge of Burglary	20
IV. Petitioner Was Subjected to Double Jeopardy, in Another Form, When He Received a Greater Punishment for the Same Offense in the Second Trial	21
Conclusion	22

Page

CITATIONS

CASES:

Adamson v. *California*, 332 U.S. 46 (1947) 6, 7, 11

Bartkus v. *People of State of Illinois*, 359 U.S. 121 (1959) 9

Benton v. *Maryland*, 232 A.2d 541, 1 Md. App. 647 (1967) 1, 10

Chicago, B & Q R.R. v. *City of Chicago*, 166 U.S. 226 (1897) 8-9

Cichos v. *Indiana*, 385 U.S. 76 (1966) 20

Commonwealth v. *Baker*, 196 A.2d 382, 384, 385, 413 Pa. 105 (1964) 10

Downum v. *United States*, 372 U.S. 734 (1963) 10

Elkins v. *United States*, 364 U.S. 206, 221 (1960) 11

Gideon v. *Wainwright*, 372 U.S. 335 (1962) 9

Green v. *United States*, 355 U.S. 184 .....16, 17, 18, 19

Malloy v. *Hogan*, 378 U.S. 1, 10 (1963) 6, 8, 9

Mapp v. *Ohio*, 367 U.S. 643 (1961) 8

McCarthy v. *Zerpst*, 85 F.2d 640 (10th Cir.), cert. denied 299 U.S. 610 (1936) 10

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 8

Palko v. *Conn.*, 302 U.S. 319 (1937) 6, 7, 8, 9, 11

Patton v. *North Carolina*, 381 F.2d 636 (4th Cir. 1967), cert. denied, 88 S.Ct. 818 (1968) 21, 22

People v. *Barrett*, 1 Johns. 66 15

Pointer v. *Texas*, 380 U.S. 400 (1965) 8, 9

Robinson v. *California*, 370 U.S. 660 (1962) 9

Schowgurow v. *State*, 240 Md. 121, 213 A.2d 475 (1965) 4

State v. *Beal*, 202 N.C. 266, 162 S.E. 561 (1932) 10

Page

State v. *Crane*, 420 S.W.2d 309, —— Mo. —— (1967) 10
State v. *Felch*, 92 Vt. 477, 105 Atl. 23 (1918) 10
State v. *Keating*, 223 Mo. 86, 94, 95, 122 S.W. 699, 700, 701 (1909) 10
State v. *Lee*, 65 Conn. 265, 30 Atl. 1110 (1894) 10
State v. *Madison*, 240 Md. 265, 213 A.2d 880 (1965) 4
State v. *Pace*, 210 Miss. 448, 49 So. 2d 710 (1951) 10
State v. *Witte*, 243 Wis. 423, 10 N.W.2d 117 (1943) 10

Tate v. *State*, 203 A.2d 882, 884, 236 Md. 312, 316 (1964) 19
Trono v. *United States*, 199 U.S. 521 17
Twining v. *New Jersey*, 211 U.S. 78 (1908) 8

United States v. *Ball*, 163 U.S. 662 (1896) ..14, 16, 18, 19
United States v. *Lewis*, 173 F. Supp. 674 (D.C.D. Colo. 1959), affd. 277 F.2d 378 (10th Cir. 1960) 16
United States v. *Oppenheimer*, 242 U.S. 85 (1915) 12
United States v. *Wilkins*, 348 A.2d 844 (1965) 9

West v. *Louisiana*, 194 U.S. 258 (1904) 8

UNITED STATES CONSTITUTIONAL PROVISIONS:

First Amendment 8
Fourth Amendment 8
Fifth Amendment 2, 3, 6, 7, 8, 9, 10, 13, 16, 19
Sixth Amendment 8, 9
Eighth Amendment 9
Fourteenth Amendment 3, 6, 8, 9, 10, 11, 12, 13, 22

Page

STATUTES:

Conn. Gen. Stat. Rev. §54-96 (1958) 10

28 U.S.C. §1257(3) 2

Wisc. Stat. §958.12(1)(d) (1961) 10

MISCELLANEOUS:

Congressional Globe, 39th Congress, 1st Session 1034 (1865-1866) 12

Flack, *The Adoption of the Fourteenth Amendment* (1908) at p. 87 12

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 201

JOHN DALMER BENTON,

Petitioner,

—v.—

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Special Appeals of Maryland entered on August 17, 1967 is reported at 232 A.2d 541, 1 Md. App. 647 (1967). Appellant sought certiorari from the Maryland Court of Appeals which was denied on December 7, 1967.

Jurisdiction

The judgment of the Special Court of Appeals of Maryland was made and entered on August 17, 1967. A copy of the judgment and opinion was appended and appears on pages 8-13 of the appendix which is printed as part of the record in this cause. Petition for certiorari was denied, without opinion, by the Maryland Court of Appeals on December 7, 1967. The petition for writ of certiorari was filed with the clerk of the Supreme Court of the United States on January 16, 1968. On June 17, 1968, this Court issued an order granting the petition for writ of certiorari and placing the same on the summary calendar.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

Constitutional Provisions Involved

1. Article Five of the Constitution of the United States of America:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis supplied.)

2. Article Fourteen of the Constitution of the United States of America:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

The instant case presents the following two questions:

1. Is the double jeopardy clause of the Fifth Amendment applicable to the States through the Fourteenth Amendment?

2. If so, was the petitioner "twice put in jeopardy" in this case?

Statement

The First Trial

On April 22, 1965, petitioner was indicted in the Circuit Court for Prince George's County, Maryland, in criminal trial No. 5595 for burglary, common-law housebreaking and larceny (A. 1). At trial, the State abandoned prosecution on the second count of the indictment, housebreaking, and the jury returned a verdict of guilty as to the first

count, burglary, and not guilty as to the third count, larceny (A. 1). Petitioner was sentenced on the burglary conviction to ten years in the house of correction.

Petitioner appealed to the Maryland Court of Appeals and, in appeal case No. 469, the court remanded the conviction (A. 2). The order was made on the basis of *Schowgurow* v. *State*, 240 Md. 121, 213 A.2d 475 (1965) and *State* v. *Madison*, 240 Md. 265, 213 A.2d 880 (1965).

Page 4 of the Maryland Court of Appeals Order directing the remand in case No. 469, contains, in part, the following statement:

> "Whereas, in the above-entitled appeal, it appeared from the record that the appellant herein was indicted by illegally constituted grand jury and/or was tried and convicted by petit jury before our decision in *Schowgurow, Madison, Smith, Hayes,* and *Wainwright* and that the appellant's conviction had not become final before our decision in *Schowgurow* . . . .
>
> "Ordered: by the Court of Appeals of Maryland that the above-entitled Appeal be remanded to the lower court for further proceedings so that the appellant herein may be brought into open court, with counsel present, either privately engaged or court appointed, and with a court reporter present for the purpose of ascertaining whether the appellant desires to avail himself of the relief afforded by the rulings handed down by this Court in a decision herein referred to . . . ."

Petitioner elected to have the conviction set aside (A. 7).

The Second Trial

On June 3, 1966 a new indictment was rendered in Case Number 6369 (A. 2). Petitioner was again charged with burglary, common-law housebreaking and larceny. At trial the State again abandoned prosecution of Count II of the indictment, common-law housebreaking (A. 3).

Prior to trial, petitioner's counsel moved the court to dismiss the larceny charge on the grounds of double jeopardy (A. 3-4). The trial court asked government counsel to state his position as to this motion and the prosecutor replied:

> "We think because of the position that the defendant found himself in when the Court of Appeals remanded this, he had an election either to allow the conviction to stand on the burglary or attack the whole indictment because of the *Schowgurow* defects; that he elected to attack the whole indictment and, therefore, has placed himself in a position of being tried on the whole indictment when re-indicted, and we feel that this is distinguishable.
>
> The Court:
>
> "Yes. I can't see under the *Schowgurow* decision where this would be double jeopardy, where he is asking for another trial" (A. 4).

Petitioner was tried on Count I, burglary, and Count III, larceny. The jury returned a verdict of guilty on both counts of the indictment, and petitioner was sentenced to 15 years of imprisonment on Count I, burglary, and 5 years on Count III, larceny, the sentences to run concurrently (A. 3).

ARGUMENT

I.

The Fifth Amendment's Prohibition Against Prosecution of a Defendant Twice for the Same Offense Should Apply, Through the Fourteenth Amendment, to State Prosecutions.

The first issue present in this case is whether the double jeopardy provision of the Fifth Amendment to the United States Constitution is applicable to State prosecutions through the Fourteenth Amendment.

If the Fifth Amendment's prohibition against "double jeopardy" applies to State prosecutions, then the federal standard for enforcement of this protection must be complied with by the State. *Malloy* v. *Hogan,* 378 U.S. 1, 10 (1963). And, as will be shown in this brief, the State of Maryland did not comply with the federal standard in dealing with petitioner.

The issue of the applicability of the Fifth Amendment in State prosecutions by absorption or incorporation into the Fourteenth Amendment was previously considered by this Court in *Palko* v. *Connecticut,* 302 U.S. 319 (1937)[1]

---

[1] According to Justice Cardozo, the States are prohibited from violating those fundamental principles of liberty and justice that lie at the base of all our civil and political institutions regardless of whether those principles are enumerated in the Bill of Rights. *Palko* v. *Connecticut, supra.* This so-called "ordered liberty" concept was subsequently stated by Justice Frankfurter in *Adamson* v. *California,* 332 U.S. 46 (1947). According to him:

> "[The Fourteenth] Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment in

where it was held that the Fifth Amendment was not applicable. It is respectfully submitted that the *Palko* decision lacks vitality in light of subsequent decisions of this Court and therefore, should not be followed in the instant case. Defendant Palko was indicted for first degree murder but found guilty of second degree murder, and thus, impliedly acquitted of the first degree murder charge. The State appealed and a new trial was ordered. In the second trial the defendant was found guilty of first degree murder and a death sentence imposed despite the defendant's objection of having been subjected to double jeopardy. On appeal, the United States Supreme Court phrased the issue of applicability as follows:

> "Does it [double jeopardy] violate those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions?" 302 U.S. at 328.

The Court concluded that double jeopardy was not one of those "fundamental principles" and therefore the Fifth Amendment was not to be extended to the States.

---

relation to the Federal Government. . . . Judicial review of that guarantee of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [appealed from] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses." *Adamson* v. *California, supra,* at 66-67.

It was also in the *Adamson* case that Justice Black, joined by Justice Douglas, vehemently dissented from the step-by-step "ordered liberty" interpretation. 332 U.S. at 71-75. In Justice Black's opinion, the "ordered liberty" concept left the Justices too much at large to impose their own views, periodically expanding and contracting the protective content of due process.

The decisions relied upon by the *Palko* Court have been undermined or overruled by the Supreme Court in recent years. *Twining* v. *New Jersey*, 211 U.S. 78 (1908), relied on in *Palko*, held that the privilege against self-incrimination was not a "fundamental privilege" and that section of the Fifth Amendment was therefore not applicable to the State governments. But, in *Malloy* v. *Hogan, supra*, this Court held, in spite of *Twining*, that the Fourteenth Amendment prohibited State infringement on the privilege against self-incrimination to the same extent that the Fifth Amendment prohibited the Federal Government. The *Palko* Court also referred to *West* v. *Louisiana*, 194 U.S. 258 (1904) in which the Sixth Amendment's right to confrontation of witnesses was not such a "fundamental principle of liberty and justice" as to be applied via the Fourteenth Amendment to State prosecutions. However, in *Pointer* v. *Texas*, 380 U.S. 400 (1965) the Court expressly overruled *West* v. *Louisiana, supra.*

It is further submitted that the *Palko* reasoning should not be followed because the "double jeopardy" guaranty is in fact as much a fundamental principle of liberty and justice as other provisions of the Bill of Rights which have been made applicable to the States through the vehicle of the Fourteenth Amendment. Under decisions of this Court, most of them subsequent to *Palko*, the following Amendments to the United States Constitution have been made applicable to the States through the Fourteenth Amendment. The First Amendment, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (Freedom of the Press); the Fourth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643 (1961) (protection against unreasonable searches and seizures by the State Government); the Fifth Amendment, *Chicago*,

B & Q R.R. Co. v. *City of Chicago,* 166 U.S. 226 (1897) (protection against deprivation of property without just compensation); Fifth Amendment, *Malloy* v. *Hogan, supra* (protection against self-incrimination); Sixth Amendment, *Gideon* v. *Wainwright,* 372 U.S. 335 (1962) (right to assistance of counsel in criminal cases); Sixth Amendment, *Pointer* v. *Texas, supra* (right of the defendant to be confronted by the witnesses against him); and, Eighth Amendment, *Robinson* v. *California,* 370 U.S. 660 (1962) (protection against cruel and unusual punishment).

It is submitted that justification for incorporation of the Fifth Amendment into the Fourteenth Amendment lies in the very language of the *Palko* decision. The history of the "double jeopardy" protection indicates that it is a "fundamental principle of liberty and justice which lie at the base of all our civil and political institutions." As stated in *United States* v. *Wilkins,* 348 F.2d 844, at 850 (1st Cir. 1965):

> "'Abhorrence to successive reprosecutions is deeply rooted in our common law traditions, and the Bill of Rights' curb on the power of the Federal Government to reprosecute is ample recognition of how central this abhorrence is to our Constitutional concept of justice."

And, as stated by Justice Black in his dissenting Opinion in *Bartkus* v. *People of State of Illinois,* 359 U.S. 121, at 153 (1959):

> "While some writers have explained the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of a State to be brought against

them in two trials, the basic and recurring thing has always simply been that it is wrong for a man to 'be brought into Danger of the same Offense more than once.' Few principles have been more deeply 'rooted in the traditions and conscience of our people'."

It is submitted that the Court should incorporate the "double jeopardy" provision of the Fifth Amendment and make it applicable to the States through the Fourteenth Amendment so as to bring about a uniform standard with respect to "double jeopardy" not present today.[2] "The

---

[2] Substantial distinctions exist between the federal standards of enforcement of the "double jeopardy" provision and enforcement of State adopted "double jeopardy" rules. Some States have no prohibition against placing a defendant in "double jeopardy". In contrast to the Federal Rule that "double jeopardy" attaches upon the swearing of the jury, *Downum* v. *United States*, 372 U.S. 734 (1963), or when evidence is first heard in a non-jury trial, *McCarthy* v. *Zerpst*, 85 F.2d 640 (10th Cir.), cert. denied 299 U.S. 610 (1936), some States follow the English rule which postpones attachment of jeopardy until entry of a verdict. *State* v. *Pace*, 210 Miss. 448, 49 So. 2d 710 (1951). Pennsylvania confines its constitutional prohibition against "double jeopardy" to capital cases only. *Commonwealth* v. *Baker*, 196 A.2d 382, 384, 385, 413 Pa. 105 (1964). A few States permit retrial after an acquittal on the merits where the indictment was defective. *State* v. *Keating*, 223 Mo. 86, 94, 95; 122 S.W. 699, 700, 701 (1909); *Benton* v. *State*, *supra* (Maryland). North Carolina allows the reopening of all offenses charged in an earlier proceeding. *State* v. *Beal*, 202 N.C. 266, 162 S.E. 561 (1932). Several States allow the prosecutor to appeal acquittals on the merits. *State* v. *Lee*, 65 Conn. 265, 30 Atl. 1110 (1894); *State* v. *Felch*, 92 Vt. 477, 105 Atl. 23 (1918); *State* v. *Witte*, 243 Wis. 423, 10 N.W.2d 117 (1943). See Conn. Gen. Stat. Rev. §54-96 (1958) permitting the State to appeal questions of law and Wisconsin Stat. §958.12(1)(d) (1961), to the same effect. The Missouri Supreme Court recently held that the "double jeopardy" guarantee is not violated where, following the reversal of his conviction for second degree murder resulting after trial on a charge of first degree murder of which the defendant was impliedly acquitted, the defendant is tried again for murder in the first degree. *State* v. *Crane*, 420 S.W.2d 309, —— Mo. —— (1967).

very essence of a healthy federalism depends upon the avoidance of needless conflict between the State and Federal Courts." *Elkins* v. *United States,* 364 U.S. 206, 221 (1960). By outlawing the present dual and conflicting systems, nondiscriminatory treatment of State defendants may be accomplished. Incorporation can beneficially end speculation by State courts as to whether, in each case, a particular State prosecution for the same offense under the same evidence would be considered by the United States Supreme Court so "acute and shocking that our polity will not endure it". *Palko* v. *Connecticut, supra.* It appears that the advantages of incorporation far outweigh the disadvantages.

Another argument in favor of incorporation is the historical purpose and intent of the framers of the Fourteenth Amendment. As stated by Justice Black in *Adamson* v. *California,* 332 U.S. 46, at page 71:

> "My study of the historical events that culminated in the Fourteenth Amendment, and the expression of those who sponsored and favored, as well as those who opposed its admission and passage, persuades me that one of the chief objectives that the provisions of the Amendment's first section, separately and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the States. With the full knowledge of the import of the *Barron* decisions, the framers and backers of the Fourteenth Amendment proclaimed its purpose to be to overturn the Constitutional rule that cases had announced. This historical purpose has never received full consideration or exposition in any Opinion of this Court interpreting the Amendment."

The task of drafting the Fourteenth Amendment was vested in the "joint committee on reconstruction." The

first draft was presented by Representative Bingham who stated that the purpose of the new amendment was to give Congress power to enforce "this immortal Bill of Rights" upon the states. Congressional Globe, 39th Congress, 1st Session 1034 (1865-1866). After the passage of the Amendment in the House of Representatives, Senator Howard introduced the proposal into the Senate during a speech which furnishes strong evidence that Congress intended to incorporate the Bill of Rights into the Fourteenth Amendment. He stated that there was presently no power in the Constitution for Congress to enforce the first eight Amendments against State deprivation of those rights, and that the purpose of the proposed amendment was to give Congress such power. Congressional Globe, 39th Congress, 1st Session at 2766 (1865-1866). Senator Howard's interpretation of the amendment was not questioned and no committee member gave a different interpretation of the meaning, intent and purpose of the amendment. Also see, Flack, *The Adoption of the Fourteenth Amendment* (1908) at p. 87.

It appears that the civil law's counterpart to "double jeopardy" has received more appropriate consideration. Justice Holmes in *United States* v. *Oppenheimer,* 242 U.S. 85 (1915), considering the principle of *res judicata* in civil cases, held that an adjudication should be considered final and binding between the same parties on the same question, as a fundamental principle of justice.

Because of the vast resources of a prosecutor in criminal cases, the stigma inherent in defending a criminal action, and the realization that if the State can re-try the issue before enough juries, a conviction is likely to occur simply as a matter of mathematical probability, "double jeopardy"

has even more applicability in criminal prosecutions than *res judicata* does in civil proceedings. Absent the "double jeopardy" protection, the State does not dispute fairly with its citizens.

For the several reasons here advanced this Court should incorporate the "double jeopardy" protection of the Fifth Amendment into the Fourteenth Amendment and thereby make it applicable in State criminal prosecutions.

II.

The Petitioner Was "Twice Put in Jeopardy" and His Conviction at the Second Trial Was Void Under the Fifth Amendment Standards.

The State of Maryland, supported by the decision from which this appeal is taken, contends that jeopardy does not attach in a criminal prosecution where a defendant is first prosecuted on an invalid indictment. The respondent pitches its opposition to the petitioner's claim on the superficial distinction between a "valid" and "invalid" indictment, contending that double jeopardy attaches only where a "valid" indictment was brought against the petitioner and is inapplicable where the indictment, subsequent to the trial, and solely at the election of the petitioner, is declared "invalid". It is respectfully submitted that this argument is unsupportable both conceptually and factually under the circumstances of petitioner's case and conflicts with federal decisions regarding the consequences of prosecution on an "invalid" indictment. Petitioner also argues that the position adopted in this case by the Maryland courts is based upon a misconception of the meaning of its own precedent concerning double jeopardy. Finally, the

petitioner argues that there was no substantial difference between the "validity" of the indictment on which he was prosecuted and any ordinary error in proceedings which would warrant a reversal, and that double jeopardy attached to the same extent.

The respondent's "invalid" indictment argument overlooks the fact that for petitioner to set aside his conviction of burglary in the first case, it was incumbent upon him, under the terms of the "Order of Remand" of the Maryland Court of Appeals, to move the court to set aside the conviction. If, for any reason, petitioner had not chosen to move the court to set aside the conviction, it would have stood. Thus, as a matter of pure logic, it cannot be said that the petitioner was not subject to jeopardy under the first indictment. Moreover, petitioner appealed only his conviction for burglary, there being no other charge pending against him at the time, and the appellate court lacked jurisdiction to decide any more than was before it. Therefore, the Maryland Court of Appeals could not and did not remand more than was before it, e.g., the burglary conviction.

Of most significance is the fact that the holding of the Maryland Court of Appeals in petitioner's case contravenes federal decisions rendered on the "double jeopardy" principle. The landmark case, in support of petitioner's contention that jeopardy attaches regardless of the validity of the indictment is *United States* v. *Ball*, 163 U.S. 662 (1896). In 1889 Millard Fillmore Ball, John C. Ball and Robert E. Boutwell were prosecuted in the United States District Court for the Eastern District of Texas under an indictment charging that all three defendants "did shoot off and discharge the contents of said gun in and upon the

body of said William T. Box, inflicting thereon ten mortal wounds, of which mortal wounds the said William T. Box did languish and languishing, did die" (at p. 663). The jury found John C. Ball and Boutwell guilty, and acquitted Millard Fillmore Ball. The convictions were set aside because the indictment did not allege where and when Mr. Box died. Retrial was ordered because of the fatally defective indictment. The government pressed its case and all of the defendants, including Millard Fillmore Ball, who was previously acquitted, were again indicted. All defendants sought to take advantage of the "double jeopardy" plea. The Supreme Court affirmed the verdict of guilty, rendered in the second trial, as to the two defendants who had been found guilty in the first trial, but drew a distinction and reversed as to Millard Fillmore Ball who had been acquitted at the first trial. In its decision, the Court first reviewed the English authority which held that an acquittal on a defective indictment was insufficient to support a plea of "double jeopardy" and analyzed the only American authority on the subject, *People* v. *Barrett,* 1 Johns. 66, which was in accord with the English position. The Court did not choose to follow the *Barrett* decision but instead, adopted the cogent reasoning of Justice Livingstone, contained in the dissent of that case.

> "'That a party shall be deprived of the benefit of an acquittal by a jury, [because of a defective indictment] . . . coming too from the officer who drew the indictment, seems not to comport with that universal and humane principle of criminal law, "that no man shall be brought into danger more than once for the same offense." It is like permitting a party to take advantage of his own wrong. If this practice be tolerated, when are trials of an accused to end?'" (at pp. 667-8).

In deciding the issue, the *Ball* Court, at p. 669, said:

> "The Constitution of the United States, in the Fifth Amendment, declares, 'Nor shall any person be subjected to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."

In *United States* v. *Lewis*, 173 F. Supp. 674 (D.C.D. Colo. 1959) affd. 277 F.2d 378 (10th Cir. 1960), a case involving facts identical to those in the instant case, the defendant was convicted in his first trial on Counts I and V of the indictment which was reversed on the ground that the indictment under which he was charged "failed to state a public offense" and was therefore fatally defective. On retrial, the government charged the defendant with several charges, including one substantially similar to the ones on which he was acquitted under the previous defective indictment. Rebutting the defendant's contention of "double jeopardy", the State argued that when the Court of Appeals declared the original trial to be a nullity, the defendant "now stands before the court as if he had never been tried for any of the alleged offenses contained in the original indictment" (at p. 675). Relying on *United States* v. *Ball, supra,* the Court upheld the defendant's plea of "double jeopardy" and concluded that jeopardy attached upon a final judgment of acquittal regardless of the validity of the original indictment.

Green v. *United States,* 355 U.S. 184 is another case which supports petitioner's contention that his second trial was improper. In *Green* the jury returned a verdict of

guilty on second degree murder and thus tacitly acquitted the defendant of the charge of first degree murder; this Court held that a successful appeal from the second degree murder conviction did not constitute a waiver of the constitutional defense of former jeopardy to a second prosecution on the first degree murder charge (pp. 191-193). In *Green* the Court overturned (see dissent of Justice Frankfurter) its ruling in *Trono* v. *United States,* 199 U.S. 521 where the Court previously held that the accused, by his appeal, had waived his right to avail himself of the prior acquittal of a greater offense. In *Trono,* the Court, at page 533, said:

> "Would you not agree to the view that the accused has the right to limit his waiver as to jeopardy, when he appeals from a judgment against him. As the judgment stands before he appeals, it is a complete bar to any further prosecution for the offense set forth in the indictment. . . . no power can rest from him the right to so use that judgment, but if he chooses to appeal from it, . . . he thereby waives if successful, his right to avail himself of the former acquittal of the greater offense."

It seems that the Court's outmoded ruling in the *Trono* case is quite similar to the ruling of the Court of Special Appeals in the instant case. In the *Green* case, this Court, at page 193, in most forceful language, said:

> "Reduced to plain terms the government contends in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he

> was not convicted and which was not involved in his appeal. Or if stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years in prison. As the Court of Appeals [the Circuit Court] said in its first opinion in this case, a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of an erroneous conviction. The law should not, and in our judgment, does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the Constitutional bar against double jeopardy."

Counsel respectfully refers this Court to the statement made by the prosecutor in his opposition to the Motion to Dismiss the larceny count of the indictment on the grounds of "double jeopardy". It is interesting in that it appears that the prosecutor believed in the "gambling" theory clearly outlawed by the *Green* case.

The "double jeopardy" prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. *United States* v. *Ball, supra.* Since the indictment in the instant case was voidable rather than void, and the petitioner had the option to set it aside, petitioner was clearly "put in jeopardy" at the first trial.

The *Green* case makes no exception in the case of a "valid" or "invalid" indictment. It makes no logical difference that a conviction is reversed for an "invalid" indictment as opposed to being reversed for any other error in the trial. What is significant is that the petitioner was placed in jeopardy at the first trial.

If the Court applies the Fifth Amendment to the States, the federal prohibition against "double jeopardy" will be applied to State prosecutions. It is submitted that the State of Maryland violated the federal standard for protection of petitioner's right to be free from "double jeopardy".

It is further submitted that in petitioner's case, the Special Court of Appeals of Maryland improperly applied the main case on which it relied, e.g., *Tate* v. *State,* 203 A.2d 882, 884, 236 Md. 312, 316 (1964). It is true that in the *Tate* case, the Maryland Court of Appeals said that jeopardy does not attach when a defendant is prosecuted on an "invalid" indictment. However, *Tate* involved a second prosecution after a successful appeal of a conviction, and not a retrial after acquittal. Of course, when a conviction is overturned by the Court of Appeals for error in the proceedings, the defendant is subject to reprosecution for the same offense for which he was previously convicted regardless of whether the error involves the trial proceedings or the indictment. *United States* v. *Ball, supra.* In this context, it appears that the principle of *Tate* v. *State, supra,* is not in conflict with any federal case ruling but that the language employed by that court exceeded the decision to which it was applied. It is respectfully submitted, therefore, that the Special Court of Appeals of Maryland misconceived the import of the *Tate* decision.

III.

The Petitioner Was Prejudiced by Standing Trial Wrongfully on the Larceny Charge Together With the Valid Charge of Burglary.

It may be argued by the respondent that since, as a result of the second trial, he received a lesser prison sentence for larceny than burglary, and since the sentences were to be served concurrently, rather than consecutively, that petitioner suffered no real prejudice by being re-tried on the larceny charge. It is respectfully submitted that the statements of Justice Fortas in his dissent in *Cichos* v. *Indiana*, 385 U.S. 76 (1966), disposes of this possible contention. The dissent reveals the realistic considerations of trial, and exposes the reason why prosecutors often will attempt to bring about a multiple count indictment. Therefore, counsel here quotes the pertinent portion of this Opinion in full. Justice Fortas said, at pages 81 and 82, that the wrongful inclusion of a less serious charge on which the defendant had been acquitted in a previous trial was materially harmful to the petitioner because:

> "First, it exposed him to the hazards of prosecution and conviction for the more onerous offense. Second, it again gave the prosecution the advantage of offering the jury a choice—a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence."

Justice Fortas condemned the "heads you lose, tails you lose trial and appellate practice". Counsel admits that when the petitioner elected to be re-tried on the burglary

charge, the prosecutor compelled him to gamble against his will in a game in which petitioner had everything to lose and nothing to gain.

IV.

Petitioner Was Subjected to Double Jeopardy, in Another Form, When He Received a Greater Punishment for the Same Offense in the Second Trial.

After petitioner's second trial, he was sentenced to serve a substantially greater sentence, e.g., fifteen years in the second trial in contrast to ten years in the first trial, for the same burglary charge. The clear effect of this sentencing practice is to discourage citizens from exhausting their post-conviction remedies. Moreover, the increased sentencing practice compels a citizen to gamble with the government. The question here raised by petitioner, whether a harsher punishment following retrial for the same offense is prohibited by the "double jeopardy" clause, was recently considered in *Patton* v. *North Carolina,* 381 F.2d 636 (4th Cir. 1967), cert. denied, 88 S.Ct. 818 (1968). The Court at page 643 held:

> "Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules, prohibiting (1) reprosecution for the same offense following acquittal, (2) reprosecution for the same offense following conviction, and (3) *multiple punishment for the same offense.*" (Emphasis supplied.)

At page 646, the Court concluded:

> "To summarize, we conclude that increasing Patton's [defendant] punishment after the reversal of his ini-

tial conviction constitutes a violation of his Fourteenth Amendment rights in that it exacted an unconstitutional condition to the exercise of his right to a fair trial, arbitrarily denied him the equal protection of the law, and placed him twice in jeopardy of punishment for the same offense."

It is submitted that the *Patton* rationale is equally applicable to the petitioner's case.

Conclusion

For the foregoing reasons, the petitioner submits that his conviction for burglary and larceny should be reversed.

Respectfully submitted,

M. Michael Cramer
H. Thomas Sisk
Laurence Levitan
Paul H. Weinstein
Counsel for Petitioner
1225 Connecticut Avenue, N.W.
Washington, D. C. 20036